IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG

BANK OF CHARLES TOWN,

Plaintiff,

v.

CIVIL ACTION NO. 3:10-CV-00102-JPB
(Removed from the Circuit Court of
Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
ENCOMPASS INDEMNITY COMPANY,
MICHELLE GROSSMAN,
JOHN WILSON, and JOHN OR JANE DOE,

Defendants.

OPPOSITION TO MOTION TO REMAND

Defendants Encompass Insurance Company (incorrectly named in the *Complaint* as "Encompass Insurance"), Encompass Indemnity Company (Encompass Indemnity), and Michele Grossman (Grossman), by counsel, oppose the *Motion to Remand* (the Motion), dkt. 13.[1] The parties' diversity is undisputed, but Plaintiff, Bank of Charles Town (Bank), asserts that its claims do not meet the amount in controversy requirement for diversity jurisdiction. The *Complaint* and applicable law show otherwise. Defendants ask the Court to deny the Motion and proceed with this action.

CLARIFICATION OF FACTS

Bank's claims arise from alleged water damage to real property (the Home) at 11 Seattle

[1]Plaintiff named "Encompass Insurance" as a Defendant, but no such entity exists. "Encompass Insurance" is a trade name used by Encompass Indemnity on stationery and other materials. See *Motion to Dismiss Encompass Insurance*, dkt. 10. It is undisputed that Encompass Indemnity issued the homeowners policy (the Policy) at issue in this action. See *Complaint*, Exh. B, Policy Declarations. Encompass Insurance Company is a separate insurer, not at issue here.

Slew Way, Martinsburg, West Virginia. The Home was listed as insured property under a homeowners policy (the Policy) issued by Encompass Indemnity to Monte Palmer and Suzette Palmer. The Palmers applied for the Policy when they and the Home's owner, James A. Howard, entered into the *Agreement for the Purchase and Sale of Improved Real Property with Preoccupancy Provision* (the Installment Contract). The Policy listed "Bank of Charles Town ATIMA" as Mortgagee; it listed Howard, and after his death, his estate, "as a person with an interest in" the Home.[2] *Complaint*; *id.* Exhs. A, Installment Contract, and B, Policy Declarations.

Bank, as ***Howard's*** mortgagee, foreclosed on the Home on May 27, 2010, and first advised the Palmers of its foreclosure on May 28, 2010. *Complaint*. Bank alleges that water damage to the Home occurred on June 2, 2010.[3] Grossman has investigated the claim, but Encompass Indemnity has made no payment for water damage to the Home. *Id.*

Bank did not lend money to the Palmers, but Bank seeks a declaration that it, as "listed 'mortgagee' and first-party insured under" the Policy, is entitled to Policy coverage for the water damage claim. *Id.* Count III. Bank alleges that Encompass Indemnity is estopped to deny Policy coverage to Bank and that Defendants "waived their right to challenge the Palmers' insurable interest after the water damage claim was made under" the Policy. *Id.* Count IV. Bank "did not assert specific monetary damages in its *Complaint*[,]" and "[n]o monetary sum was asserted against" any individual Defendant. *Memorandum of Law in Support of Plaintiff's Motion to Remand* (the Bank Memo), dkt.

[2]ATIMA ("As Their Interest May Appear") shows that a lienholder's interest in the property insured varies with the debt owed by the insured to the lienholder at the time of a loss.

[3]Encompass Indemnity's investigation indicated that Mr. Palmer first noted a water overflow on May 31, 2010.

14, at 2.

However, Bank alleges Encompass Indemnity's breach of contract and its duty of good faith and fair dealing, and all Defendants' violation of the Unfair Trade Practices Act (the UTPA), W. Va. Code § 33-11-4(9)(c), (e), (n), and legislative rules. *Complaint*, Counts I, II. Bank seeks Policy coverage and money damages of "attorney's fees, costs, damages for annoyance and inconvenience and net economic losses under *Hayseeds*, and its progeny[]" and compensatory and punitive damages for Defendants' alleged "common law and statutory bad faith conduct[.]" *Id.*, prayer.

LEGAL STANDARD

Defendants must meet all removal requirements at the time of removal. *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994). The Court has jurisdiction only if there is complete diversity and the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a)(1). The Court remands a case if its jurisdiction is in doubt, but if it has jurisdiction, the Court must exercise it. *Gum v. General Electric Co.*, 5 F.Supp.2d 412, 415 (S.D.W. Va. 1998) ("It is well-established federal courts have a 'virtually unflagging obligation ... to exercise the jurisdiction given them.'" (inner citation omitted)).

DISCUSSION

A. The Court considers Bank's *Complaint*, its attachments, and common sense to determine the amount in controversy.

"[T]he amount in controversy is determined by considering the judgment that would be entered if the plaintiff prevailed on the merits of his case as it stands at the time of removal." *Sayre v. Potts*, 32 F.Supp.2d 881, 886 (S.D.W. Va. 1999). The Court ordinarily looks to a complaint's prayer, *Memorandum Opinion and Order*, *Lily's LLC v. Motorists Mut. Ins. Co.*, No. 5:09-cv-122

(N.D.W. Va. Jan. 12, 2010), dkt. 19, at 4 (citing *Sayre*, 32 F.Supp.2d at 887), but West Virginia does not require, and Bank's *Complaint* does not seek, a stated amount of damages. "[A]bsent a binding stipulation signed by [the plaintiff] that he will neither seek nor accept damages in excess of $75,000, the Court must independently assess whether the defendants have proven by a preponderance of the evidence" that the complaint seeks more than $75,000. *Virden v. Altria Group, Inc.*, 304 F.Supp.2d 832, 847 (N.D.W. Va. 2004) (citing *McCoy v. Erie Ins. Co.*, 147 F.Supp.2d 481, 488-89 (S.D.W. Va. 2001)). Bank does not stipulate that it will "neither seek nor accept damages in excess of $75,000[.]" *Id.*

The Court "may consider the entire record" and "conduct its own independent inquiry" to assess whether the action meets the $75,000 requirement. *Lily's LLC*, No. 5:09-cv-122, dkt. 19, at 3 (citing *Mullins v. Harry's Mobile Homes, Inc.*, 861 F. Supp. 22, 23 (S.D.W. Va. 1994)). It "can look to evidence available at the time of removal[,]" including "the plaintiff's causes of action[,]" and "use its 'common sense'" to determine the amount in controversy. *Id.* at 4 (citing *Chase v. Shop 'N Save Warehouse Foods*, 110 F.3d 424, 427 (7th Cir. 1997); *Mullins*, 861 F. Supp. at 24).

B. The *Complaint*, its attachments, and common sense show that Bank seeks over $75,000.

Complaint Count I seeks Policy coverage for "the cost of repairing the water damage, as well as lost rental income during the time that Encompass Defendants dragged out the coverage investigation." *Complaint* ¶ 41. The amount in controversy on Counts III and IV, for declaratory judgment or coverage by estoppel or waiver, is "'measured by the value of'" the litigated coverage. *McCoy*, 147 F.Supp.2d at 492 (quoting *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 347 (1977)).

Bank asserts that its Count I breach of contract claim amounts to $6,400, not including lost rentals. Bank Memo at 3 n. 4. Since the Palmers paid monthly rent of $2,342.97 until they left the Home at the end of May, 2010, *Complaint*; *id.*, Exh. A, Installment Contract, Bank implicitly alleges lost rent of $2,342.97 for each month until this action is resolved. Even if coverage were resolved in Bank's favor in December, 2010, for $6,400, and Bank sought seven (7) months lost rent of $16,400.79, its compensatory damages would equal $22,800.79. *Lily's LLC*, No. 5:09-cv-122, dkt. 19 at 3, 4; *Chase*, 110 F.3d at 427; *Mullins*, 861 F. Supp. at 24.

Count I also alleges Bank's right to compensatory and punitive damages under *Hayseeds, Inc. v. State Farm Fire and Cas.*, 352 S.E.2d 73 (W. Va. 1986). Consequential damages for attorney fees, annoyance, inconvenience, and net economic losses are a substantive right if Bank "substantially prevails" on coverage, Syl. Pt. 1, *id.*, and are not proportional to the amount of Policy coverage. *Richardson v. Kentucky Nat. Ins. Co.*, 607 S.E.2d 793 (W. Va. 2004); see *Missouri State Life Ins. Co. v. Jones*, 290 U.S. 199 (1933); *Saval v. BL, Ltd.*, 710 F.2d 1027, 1033 (4th Cir. 1983) (citing *Jones*, 290 U.S. 199). For example, "when a policyholder with a valid claim is compelled by an insurance company to expend significant attorney effort to recover a 'small' amount of coverage under a policy, the policyholder will still be able to shift the entire attorney's fee onto the insurance company[.]" *Richardson*, 607 S.E.2d at 801 n. 7.

Bank asserts that Defendants can prove an amount in controversy over $75,000 only if Bank seeks "an unusually high award for attorney's fees and costs[.]" Bank Memo at 4. Yet common sense indicates that Bank's counsel will, if successful, charge not only for pursuing the $6,400 water damage claim, but also for the lost rental, declaratory judgment, and estoppel/waiver claims; for the *Hayseeds* consequential and punitive damages claims; and for the UTPA compensatory and punitive damages claims. *Richardson*, 607 S.E.2d at 801 n. 7; *Lily's LLC*, No. 5:09-cv-122, dkt. 19, at 3, 4;

Chase, 110 F.3d at 427; *Mullins*, 861 F. Supp. at 24; *Richardson*, 607 S.E.2d at 801 n. 7.

Bank seeks *Hayseeds* punitive damages based on Encompass Indemnity's alleged "breach of the duty of good faith and fair dealing, and other wrongful conduct[.]" *Complaint* ¶ 41. Punitive damages are available only upon proof of an insurer's "actual malice," meaning that "the company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally denied the claim." *Hayseeds*, 352 S.E.2d at 80-81. Bank actively phrases its allegations that "Grossman advised [Bank] that she ***was under no obligation to tell [Bank] anything*** about the status of the Defendants' coverage investigation[;]" that Encompass Indemnity "***refused to advise*** the Palmers about the status of the ... coverage investigation[]" although Policy premiums were fully paid; that "Grossman ***refused to provide a time frame***" for resolution of the Water Damage Claim and "asserted that she was ***under no obligation to do so***[;]" that, when asked to "agree to transfer [Bank] to someone who would be willing to negotiate and possibly settle the claim," Grossman "advised that ***there was no such person***[;]" and that Defendants "***refused to provide information*** to the interested parties concerning the coverage investigation, the claim investigation, or the time frame concerning either[.]" *Complaint* ¶¶ 29-32, 38 (emphasis added). The active phrasing shows Bank's perception of "actual malice" in the claim handling. If Bank were able to prove Encompass Indemnity's or Grossman's willful refusal to cooperate with an insured on a rightful claim, such conduct would support *Hayseeds* punitive damages. *Hayseeds*, 352 S.E.2d at 80-81.

Bank suggests it would expect punitive damages of less than five (5) times compensatory damages on its Count I claims. Bank Memo at 4 (citations omitted). The basic Count I claims, $22,800.79; a minimal attorney fee of just one-third of the $6,400 water damage claim, $2,133; and Bank's $145.00 cost to file this action in the state court together yield $25,078.79. If punitive damages of just three (3) times Count I compensatory damages, or $75,236.37, were awarded, Bank would recover $100,315.16, more than the jurisdictional minimum. 28 U.S.C. § 1332(a)(1); *Sayre*, 32 F.Supp.2d at 886-87; *Richardson*, 607 S.E.2d at 801 n. 7; *McCoy*, 147 F.Supp.2d at 492; *Lily's LLC*, No. 5:09-cv-122, dkt. 19 at 3, 4; *Chase*, 110 F.3d at 427; *Mullins*, 861 F. Supp. at 24; Syl. Pt. 1, *Hayseeds*, 352 S.E.2d 73; *id.* at 80-81.

The Court also considers Bank's UTPA claims. An insurer may be held liable for UTPA violations. *Jenkins v. J. C. Penney Cas. Ins. Co.*, 280 S.E.2d 252. A "claim adjuster employed by an insurance company" may be held personally liable for his or her UTPA violations. Syl. Pt. 1, *Taylor v. Nationwide Ins. Co.*, 589 S.E.2d 55 (W. Va. 2003). Bank seeks UTPA damages from all Defendants. *Complaint* Count II. Any UTPA compensatory damages would be added to Bank's Count I damages claim, reasonably estimated at $100,315.16. See above.

Bank also alleges that "Defendants' misconduct so willfully and completely disregarded the rights of [Bank] that it gives rise to an award of [UTPA] punitive damages." *Complaint* ¶ 54; *McCormick v. Allstate Ins. Co.*, 505 S.E.2d 454 (W. Va. 1998). Bank alleges that Encompass Indemnity, its "selling agent, and underwriting department(s), ***obtained, or had every opportunity to obtain***," the Installment Contract and "a copy of the Deed for" the Home real estate "prior to issuance of the" Policy; that Encompass Indemnity "***regularly required and accepted premium payments***" for the Policy; that "[o]n the date of loss, the Palmers were current on their insurance premiums ...[;]" that Defendants violated the UTPA by, among other things, ***"failing to affirm coverage within a reasonable period*** of time ..." and "***failing to promptly provide a reasonable explanation of the basis*** in the" Policy for denying the claim or offering to compromise it. *Complaint* ¶¶ 45-48, 51 (emphasis added). The quoted allegations show Bank's punitive damages theory, that Encompass Indemnity and its adjuster knew or should have known that Bank's claim was proper, yet willfully chose not to settle it promptly. Syl. Pt. 2, *McCormick*, 505 S.E.2d 454. If Bank could prove its implicit allegations of "actual malice," it could recover UTPA punitive damages. *Id.* Such damages of just three (3) times compensatory damages, see Bank Memo at 4, would, with UTPA compensatory damages and Count I compensatory and punitive damages, far exceed the jurisdictional minimum. 28 U.S.C. § 1332(a)(1); *Lily's LLC*, No. 5:09-cv-122, dkt. 19 at 3, 4; *Chase*, 110 F.3d at 427; *Mullins*, 861 F. Supp. at 24; Syl. Pt. 2, *McCormick*, 505 S.E.2d 454.

The preponderance of the evidence shows that Bank seeks more than $75,000 in this action. *Complaint*; *Virden*, 304 F.Supp.2d at 847; *Richardson*, 607 S.E.2d at 801 n. 7; *McCoy*, 147 F.Supp.2d at 492; *Lily's LLC*, No. 5:09-cv-122, dkt. 19 at 3, 4; *Chase*, 110 F.3d at 427; *Mullins*, 861 F. Supp. at 24; Syl. Pt. 1, *Hayseeds*, 352 S.E.2d 73; *id.* at 80-81; Syl. Pt. 2, *McCormick*, 505 S.E.2d 454. This action meets all requirements for diversity jurisdiction. 28 U.S.C. § 1332(a)(1). Defendants ask the Court to deny the Motion, exercise its jurisdiction, and proceed with this action.

CONCLUSION

The parties' diversity is undisputed. The evidence, including the *Complaint* and its attachments, and common sense show that Plaintiff, Bank of Charles Town, seeks damages of more than $75,000 for Defendants' alleged acts or omissions. The Court has jurisdiction of this action. 28 U.S.C. § 1332(a)(1). Defendants ask the Court to deny the *Motion to Remand* and exercise its jurisdiction by proceeding with this action.

ENCOMPASS INSURANCE COMPANY, improperly named as Encompass Insurance, ENCOMPASS INDEMNITY COMPANY, and MICHELE GROSSMAN, By counsel,

/s/ *Ellen R. Archibald*

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BANK OF CHARLES TOWN,

Plaintiff,

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CIVIL ACTION NO. 3:10-CV-00102-JPB
(Removed from the Circuit Court of Jefferson County, No. 10-C-312)

ENCOMPASS INSURANCE,
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JOHN WILSON, AND JOHN OR JANE DOE,

Defendants.

CERTIFICATE OF SERVICE

I, Ellen R. Archibald, counsel for Encompass Insurance Company and Encompass Indemnity Company, do hereby certify that on the **8th day of November, 2010**, I electronically filed the foregoing **OPPOSITION TO MOTION TO REMAND** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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